No. 20269

In the

United States Court of Appeals

For the Ninth Circuit

ESTATE OF JOSEPH L. HASKINS, Deceased,)
LLOYD L. EDWARDS and JAYNE C. HASKINS,)
EXECUTORS,)
)
Appellant,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)

On Appeal from the United States District Court for the Northern District of California, Southern Division

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APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

This case was commenced by the filing of a complaint for refund of taxes filed in the District Court for the Northern District of California, Southern Division. The complaint was filed on April 4, 1963, which was more than six

months after appellant had timely filed its claim for refund with the District Director of Internal Revenue at San Francisco, California (R. 1, 70, 102, Findings ¶7). Jurisdiction was conferred on the District Court by virtue of 28 U.S. Code §1346(a). The District Court entered judgment against appellant on May 3, 1965, and appellant filed its notice of appeal on June 10, 1965, (R. 116, 118).

Jurisdiction to hear this appeal is conferred upon this Court by virtue of 28 U.S. Code §1291.

STATEMENT OF THE CASE

Upon the death of Joseph L. Haskins, the Commissioner[1/] included in his estate for estate tax purposes the entire corpus of a trust, referred to hereafter as the "Home Ranch Trust," which Joseph had created pursuant to a property settlement agreement incident to his divorce from Mildred Haskins (R. 99, Findings ¶3, ¶4; R. 101, 102, Findings ¶7). The Estate here seeks a refund of the taxes

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1/ Originally, taxpayer reported the trust as includible, but later filed an amended return and claim for refund, upon which no formal action was taken until after suit was filed (R. 7). Informal notice of the denial had been given appellant prior to this suit.

paid on the basis of that determination (R. 102, Findings ¶7).

Joseph L. Haskins and his wife Mildred were divorced in 1948, after 35 years of marriage(R.99,100,Findings ¶2, ¶5). Their two daughters were grown; their only son was 15 years old (R. 99, Findings ¶2, ¶3).

On March 1, 1947, Joseph and Mildred Haskins entered into a property settlement agreement dividing and disposing of their community property and settling all marital rights and liabilities as well as confirming to each spouse his or her separate property (R. 13, Exhibit 1-A). The agreement was to take effect on January 1, 1948 (R. 18, Exhibit 1-A).

The property settlement agreement imposed the following obligations on Joseph:

1. To convey to Mildred community property consisting of securities and cash, having a value of $100,000.00 (R. 99, Findings ¶4);

2. To dispose of an additional $100,000.00 in community assets by transfers to the children or by the establishment of an irrevocable trust in which he

could reserve the income to himself for life with remainders to the children, though in either case he was required to treat the three children substantially equally (R. 100, Findings ¶4); Joseph later satisfied this obligation by creating the Home Ranch Trust (TR. 33, 34);

3. To pay alimony of $250.00 per month for the rest of 1947, a total of 10 months (R. 100, Findings ¶4);

4. To pay $1000.00 for his wife's attorney (R. 100, Findings ¶4);

5. To maintain life insurance in the amount of $20,000.00, payable to Mildred or on her death to the children, an obligation which cost him $521.34 a year (Tr. 138; R. 100, Findings ¶4);

6. To pay all 1947 income taxes, an obligation which cost him $27,026.61 (Tr. 139; R. 100, Findings ¶4);

7. To support his son Joseph, Jr., the only minor child of Mildred and Joseph (R. 13, 16, Exhibit 1-A);

8. To provide for the adult children in case of emergency (R. 16, Exhibit 1-A).

In return for Joseph's promises Mildred agreed to do the following things:

1. To put the $100,000 in community assets which she received into a trust, reserving the life income to herself with the remainder to the children (R. 99, 100, Findings ¶4);

2. To convey to Joseph all the community property not otherwise disposed of (R. 100, Findings ¶4).

The agreed value of the community property stated in the property settlement agreement by Joseph and Mildred was $333,645.70 (R. 100, 102; Findings ¶4, ¶8). Evidence was received from which it could be concluded that this property had a fair market value as of January 1, 1948, the effective date of the agreement, of $482,419.00 (R. 102, Findings ¶8). Thus Mildred relinquished some $66,823.00 to $141,209.00 worth of community property (one-half of the community property not otherwise disposed of) to Joseph (R. 102, 104, Opinion).

The Court failed to find the amount of the excess community property acquired by Joseph under the property settlement agreement. The Court deemed such findings unnecessary because it found Joseph was

the sole settlor of the trust, and that he received no consideration for its creation (R. 101, Findings ¶5, ¶6; R. 107, Opinion). The Court further found that the excess value of the community property received by Joseph under the property settlement agreement was not intended as the thing given in exchange for his promise to create the trust (R. 101, Findings ¶6; R. 105, 106, Opinion).

The questions involved in this appeal are:

1) Can the transfer of property in consideration of property received, under an agreement, be held to be without consideration, for purposes of Sections 2036(a) and 2043(a), Internal Revenue Code of 1954?

2) Is it reversible error for the trial court to find that a transfer was made without consideration when the oral testimony and documentary evidence were uncontradicted and to the contrary?

3) Is it reversible error for the District Court to exclude evidence of a deceased person's declarations of past intent, when these are admissible under the decisional law of the State in which the court sits?

SPECIFICATIONS OF ERRORS

1. The trial court erred as a matter of law in holding that the Home Ranch Trust was not established by Joseph in consideration for the excess community property he received from Mildred under the property settlement agreement, and, hence, erred in holding that the Home Ranch Trust was includible in Joseph's estate on his death.

2. The trial court erred in finding as a fact, contrary to all the evidence, that the excess community property paid to Joseph by Mildred was not consideration for the establishment of the Home Ranch Trust, and, hence, erred in holding that the Home Ranch Trust was includible in Joseph's estate on his death.

3. The trial court erred in excluding testimony of Mildred's motivation in paying the excess community property to Joseph. Appellant had offered the testimony of Joseph L. Haskins, Jr., that when Mildred asked him to serve as Executor of her estate some seven years after these events had transpired, she told the witness that she had used her interest in their community property to secure for her children the Home Ranch property and the adjoining property (Tr. 101, 102; R.

96, Stipulation for Correction). Mrs. Haskins had since died (Tr. 38). Counsel for appellee's objection was:

> "I still maintain it is hearsay and not admissible under any exception thereto. The facts of record as to what the parties did and accepted was gone over this morning. The facts are of record as to what they did with the property. Her thoughts, her wishes and her interpretations, I believe, are not competent evidence stemming from this witness or any witness who had a conversation with her to that effect." (Tr. 102).

STATUTES AND REGULATIONS INVOLVED

The statutes involved are Sections 2036(a) and 2043(a) of the Internal Revenue Code, which are reproduced in the Appendix, infra. The regulations involved are Treasury Regulations [Part 20 of Title 26 of the Code of Federal Regulations] Sections 20.2036-1(a) and 20.2043-1(a relevant portions of which are reproduced in the Appendix.

SUMMARY OF ARGUMENT

First, the Home Ranch Trust was created by Joseph pursuant to a binding obligation imposed on him by a marital

property settlement. Under that agreement Joseph received substantially more than he was entitled to under the community property laws of California. In effect his wife relinquished a part of her half interest in their community property to him. Under the terms of the agreement and under applicable California law, this relinquished interest of his wife was consideration to him for his promise to create the trust. The trial court held, however, that the Home Ranch Trust was set up gratuitously. In so doing the trial court erred in refusing to follow controlling California law that marital property settlement obligations are made in consideration of each other. The trial court further erred in reaching a result contrary to the recent decision of this Court in United States v. Past, 347 F.2d 7 (9th Cir. 1965) [holding that a transfer in trust under a California community property settlement agreement was excludible from the transferor's estate to the extent of the consideration received].

Second, the trial court's finding that Joseph transferred property to this trust without consideration is contrary to all the evidence in the record and must be reversed. The property settlement agreement itself provided that its

obligations were consideration for each other, and the testimony of Mildred's lawyer and two of Joseph's own children indicated that the negotiation of the settlement was at arm's length. The testimony fully supports the language of bargain and sale used in the property settlement agreement. There was no evidence to the contrary.

Third, the trial court erred in excluding evidence of Mildred's intent and purpose in relinquishing a part of her interest in their community property to Joseph. Her statement was made to her son in a serious context and before this controversy arose. Because Mildred was dead at the time of trial, her son was called and asked to testify to her statements. His testimony of Mildred's past intent and purpose was admissible under California law and it was reversible error to refuse to accept it. Rule 43(a), F.R.C.P.

ARGUMENT

I. AS A MATTER OF LAW, A TRUST CREATED PURSUANT TO A CALIFORNIA MARITAL PROPERTY SETTLEMENT AGREEMENT IS SUPPORTED BY CONSIDERATION AND SHOULD BE EXCLUDIBLE FROM THE ESTATE OF THE TRUSTOR TO THE EXTENT

OF THE VALUE OF THE CONSIDERATION RECEIVED BY HIM.

This question is no longer an open one in this Circuit. Just after the trial court filed its opinion [April 12, 1965 (R. 98)] and entered judgment [May 3, 1965 (R. 116)], this Court handed down its decision in United States v. Past, 347 F.2d 7 (9th Cir. 1965). Both at pre-trial and at the time of trial, the Court below was advised of the pendency of the Past case and of its bearing on the issues of this case. The Court below, however, elected to reach its own opinion and enter its own judgment without waiting for this Court to clarify the law on this issue. Because the decision in this case is contrary to the result reached and the principles laid down in the Past decision, the trial court's decision must be reversed and the case remanded.

What happened in Past was simple. There a California couple owning substantial community property got divorced after 25 years of marriage. Because the wife was an alcoholic, the parties agreed that she should be made the life beneficiary of a substantial trust rather than being paid her one-half of the community property outright. The marital property

settlement agreement therefore provided that the husband was to receive part of the community property outright and the balance ($487,978) was to be transferred to an irrevocable spendthrift trust for the benefit of the wife for life, remainder to their children. Because the trial court had found that the transfer into trust was made jointly by husband and wife, this Court concluded that the wife had contributed $243,989 to the trust. In exchange for her contribution to the trust, the wife received a life estate in the amount contributed to the trust by her husband. The value of her life estate in her husband's contribution to the trust was $143,345.97. On the wife's death, the government contended that the entire trust was includible in her estate for estate tax purposes because she had retained a life estate in it. Section 2036(a) I.R.C. The trial court held no part of the trust was includible because it had been set up as part of a marital settlement and therefore constituted ". . . a bona fide sale for an adequate and full consideration in money or money's worth . . ." within the meaning of the parenthetical exception to the application of Section 2036(a) I.R.C. This Court reversed. It held (1) that although the wife's transfer in trust pursuant to a martial property settlement agreement was

a transfer for consideration, it could not be a bona fide sale because the value of the consideration received was less than the property transferred, and (2) that the wife's estate was entitled to exclude that portion of the trust property which equalled $143,345.97, or the amount of consideration she had received when the trust was created.

What happened here is also simple. Here a California couple owning substantial community property got divorced after 35 years of marriage (R. 94). Because the wife feared that her divorced husband would remarry, the parties agreed that the husband should be required to transfer $100,000 worth of the community property to an irrevocable trust for the benefit of himself for life, remainder to their children. Had the trial court found that the transfer into trust was made jointly by husband and wife, then the computation of the Past case would be applicable.2/ Because the trial court

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2/ Joseph was 57 years of age when the trust was set up (R. 94). If Mildred were considered to have contributed $50,000 of the $100,000 which went into the Home Ranch Trust, then Joseph would have received a life estate worth $21,721 (Treasury Regulations §25.2512-5, Table I) in

found Joseph to be the sole grantor of the trust (R. 101, Finding ¶5), it is necessary to look to the total community property split-up to see whether Joseph received consideration for his transfer of property to the Home Ranch Trust. The Court below found that "[t]he declared approximate value of the community property at the time of the property settlement agreement, March 1, 1947, was $333,645.70, including an estimated $4,000 for tangible personal property." (R. 102, Findings ¶8). Of this $100,000 moved to Mildred and the balance, $233,645.70 moved to Joseph. Joseph thereupon paid $100,000 into the Home Ranch Trust pursuant to his obligation under the property settlement agreement (R.100, 101, Findings ¶4, ¶5). He retained a life estate worth $43,442. Treasury Regulations §25.2512-5, Table I. The amount transferred by him was the value of the remainder, or $56,558. The balance of the community property, $133,645,

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2/ [Cont'd] Mildred's half. Accordingly, the amount includible in Joseph's estate would be $92,780 [one-half the value of the trust on Joseph's death (R. 11, 101)] less $21,721 (the consideration received), or a net amount of $71,059. The court below held that the entire value of the Home Ranch Trust ($185,560) was includible in Joseph's estate.

all retained by Joseph.[3/] One-half of it originally belonged to him, but the other one-half was transferred to him by Mildred under the terms of the same property settlement agreement that required Joseph to transfer $56,558 to the Home Ranch Trust. Because the amount paid to Joseph (one-half of $133,645, or $66,822) exceeded the amount transferred to the Home Ranch Trust ($56,558), the Home Ranch Trust was created "for an adequate and full consideration in money or money's worth."

The court below avoided the problem of measuring the adequacy of the consideration received by the simple device of finding that,

> "The allocation and conveyance to Joseph L. Haskins as his sole and separate property of a disproportionate share of the community property of the parties were not intended by either Joseph L. Haskins

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3/ There is evidence in the record that the actual value of the community property on January 1, 1948, was $482,419 (R. 102). On the basis of this value, the amount retained by Joseph would be greater than $133,645.

> or Mildred E. Haskins as consideration for the establishment of the Home Ranch Trust, and such disproportionate share of the community property was not received by Joseph L. Haskins as consideration for the establishment of the Home Ranch Trust." (Findings ¶6, R. 101).

This finding cannot stand. It is erroneous as a matter of law. The Home Ranch Trust was created by Joseph in satisfaction of an obligation he incurred to Mildred Haskins under a property settlement agreement executed in anticipation of their divorce (Tr.33,34;R.100). The agreement required him to

> "place in a trust, with himself and any trust company, or himself alone as trustee, or make gifts to one or more of the children of said parties outright, or in trust for their use or benefit, ONE HUNDRED THOUSAND AND NO/100 DOLLARS ($100,000.00) worth of community assets including either real property, securities or cash, at a valuation fixed in the same manner as required for Federal Estate Tax appraisals as of January 1, 1948. Said Declaration of Trust shall be irrevocable and in the form

> of trusts of like character . . . and may either reserve the income for life to husband or provide that the income from a portion thereof shall be paid to the children of the parties; remainder to the three children of the parties; share and share alike . . . . It is understood that as near as is possible, the value of the remainder to the children who take only as remaindermen and the value of the gifts to any one or more of the children, shall be so arranged that they are treated equally." (R. 15, 16.)

Joseph Haskins thus created the Home Ranch Trust pursuant to an obligation binding under California law. Cal. Civil Code §159. Each and every provision of such a property settlement agreement is enforceable because it is a promise supported by consideration. Kamper v. Waldon, 17 Cal.2d 718, 112 P.2d 1 (1941) [holding husband's obligation under a property settlement agreement to support a child until 21 was enforceable even though the child married at 17 where consideration for the promise was the wife's relinquishment of an interest in community property]. Under California law Mildred had owned an equal one-half interest in the entire community

property prior to the execution of the property settlement agreement. Cal. Civil Code §161a. At the time the agreement was executed, Mildred agreed to relinquish part of her one-half community interest to Joseph. At the same time Joseph agreed to establish the Home Ranch Trust. His agreement so to do was enforceable by Mildred. Sonnicksen v. Sonnicksen, 45 Cal.App.2d 46, 113 P.2d 495 (1941) [specific performance decreed of a promise to will property contained in a separation agreement]. A property settlement agreement must be construed as a whole. Calif. Civil Code §1641; Janise v. Janise, 195 Cal.App.2d 433, 15 Cal. Reptr. 742 (1961) [obligation under property settlement agreement by husband to pay encumberances on real property conveyed to wife held to survive husband's death based on a construction of the contract as a whole]. It was therefore error for the court below to single out one promise made in the property settlement agreement (i.e., Joseph's promise to create the Home Ranch Trust) to hold that it alone was not bargained for nor supported by consideration.[4/] The property settlement agreement had been drawn up under

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4/ The property settlement agreement itself states the intent of the parties to integrate all of their undertakings. It

California law, dealt with a California marriage and California community property, and must be interpreted in accordance with the law of California. Because the court below interpreted the property settlement agreement in a manner contrary to California law, it must be reversed. Blair v. Commissioner, 300 U.S. 5, 57 S. Ct. 330, 81 L.Ed. 465 (1937) [reversing the Court of Appeals for refusing to follow the law of Illinois in interpreting an Illinois trust agreement].

And the rule in federal tax cases is the same. The courts have uniformly held that transfers made pursuant to a property settlement agreement are transfers supported by a consideration for

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4/ [Cont'd] states, "NOW, THEREFORE, in consideration of the premises and of the mutual promises, releases, waivers, and conveyances herein made, or to be hereafter made, IT IS MUTUALLY AGREED AS FOLLOWS * * *" (R. 13). The obligation of Joseph to set up the Home Ranch Trust was stated as paragraph 7 of eighteen numbered paragraphs (R. 15-16). There is no logical reason why paragraphs 1 through 6 and 8 through 18 should be consideration one to the other but paragraph 7 not.

estate and gift tax purposes. United States v. Past, supra; Rosenthal v. Commissioner, 205 F.2d 505, 509 (2d Cir. 1953) [transfers to children under property settlement agreement held not taxable gifts if made pursuant to arm's length transaction or taxable only to extent they exceeded the consideration received to be determined on remand]; Ruby G. Grigg, 20 T.C. 420 (1953) [finding no gift tax payable on a wife's transfer to her husband of properties in pursuance of a marital property settlement on the ground that the transfers were for an adequate consideration in money and money's worth]; Harris v. Commissioner, 340 U.S. 106, 71 S.Ct. 181, 95 L.Ed. 111 (1950) [finding no taxable gifts in the transfer of an excess of the value of the property which a wife gave her husband over what he gave her pursuant to a marital property settlement agreement, on the theory that the transfer was pursuant to a promise or agreement].

Because the court below found that the transfer was without consideration, it must be reversed. The trial court should be instructed that Joseph's transfer to the Home Ranch Trust was supported by consideration and the trial court should be further directed to make a finding of fact as to the dollar amount of the consideration received by him for the transfer.

The only question remaining is whether Joseph's transfer to the Home Ranch Trust constituted a "sale" within the meaning of the parenthetical exception to Section 2036 or a "transfer for an inadequate consideration" within the meaning of Section 2043. It was not necessary for the Court to reach this point in United States v. Past, supra, because the transfer there was for a less than adequate consideration and, hence, could not be a "bona fide sale."

Here, however, Joseph received more than adequate consideration for his transfer. He transferred $100,000 to the Home Ranch Trust, of which $43,442 was retained by him through his life estate and $56,558 was transferred for the benefit of the remainderman. For the transfer of this $56,558, he received at least $66,822 from Mildred. Because he received full and adequate consideration and because the transfer was bargained for at arm's length between spouses in the throes of divorce, the transfer should be treated as a bona fide sale for estate tax purposes. As such it meets the definition of a sale as being ". . . a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration)." WEBSTER'S THIRD NEW

INTERNATIONAL DICTIONARY (G. & C. Merriam Co., Springfield, Mass., 1965), p. 2003[5/].

And in Harris v. Commissioner, 340 U. S. 106 at 112, 71 S.Ct. 181, 95 L.Ed. 111 (1950), the Supreme Court, speaking through Justice Douglas, said:

> "The Treasury Regulations recognize as tax free 'a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent).' This transaction (an unequal Nevada property settlement agreement) is not 'in the ordinary course of business' in any conventional sense. Few transactions between husband and wife ever would be; and those under the aegis of a divorce court are not. But if two partners on

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5/ The regulations under Section 2043 define a sale to be any transfer made for a full and adequate price ". . . reducible to a money value." Reg. §20.2043-1(a). It is bona fide if ". . . made in good faith . . ." Ibid. The definition of these regulations is incorporated in the regulations under Section 2036. See Reg. §20.2036-1(a), first sentence. See Appendix.

> dissolution of the firm entered into a transaction of this character or if chancery did it for them, there would seem to be no doubt that the unscrambling of the business interests would satisfy the spirit of the Regulations. No reason is apparent why husband and wife should be under a heavier handicap absent a statute which brings all marital property settlements under the gift tax." (Emphasis added).

The government has continuously and successfully contended for income tax purposes that unequal community property settlement agreements were taxable sales. Johnson v. United States, 135 F.2d 125 (9th Cir. 1943), [finding a taxable gain to the husband upon his receipt of some $2000 more value of property than he was required to give up in a California property settlement agreement entered into in anticipation of his divorce]; Jessie Lee Edwards, 22 T.C. 65 (1954), [taxing the wife on her disposition of most of the community property under a marital property settlement agreement in exchange for some community property, cash and a note]; and Rouse v. Commissioner, 159 F.2d 706 (5th Cir. 1947), [requiring a husband to

use as his basis for former community property acquired by him pursuant to a marital property settlement agreement his original cost as to one-half of the property, and his payments to his wife under the agreement as to the other one-half, on the theory that the transfers made under the agreement were consideration for each other, and therefore his basis for what he acquired under the Agreement was what he paid under the Agreement]. And in common law states, marital property settlements are taxable sales for income tax purposes giving rise to taxable capital gains in cases in which the husband transfers appreciated property to his wife in discharge of intangible marital rights. United States v. Davis, 370 U.S. 65, 82 S.Ct. 1190, 8 L.Ed.2d 335 (1960).

There is no reason why an unequal community property settlement should be treated as a sale for income tax purposes but not for estate tax purposes.6/

6/ The only justification that the government could offer for its inconsistent treatment of property settlements under the estate and income tax laws is loss of revenue. By contending that property settlements are taxable sales for income tax purposes, the Treasury collects a capital

Accordingly, the court below should be instructed to hold that the transfer by Joseph was a sale excludible in full from his estate if it finds that Joseph received valuable property equal or greater in value for it.

II. THE TRIAL COURT'S FINDING THAT THE PROPERTY SETTLEMENT TRUST WAS NOT CREATED FOR CONSIDERATION IS CONTRARY TO ALL THE EVIDENCE IN THE RECORD.

The trial court found that,

> "6. The allocation and conveyance to Joseph L. Haskins as his sole and separate property of a disproportionate share of the community property of the parties were not intended by either Joseph L. Haskins or Mildred E. Haskins as consideration for the establishment of the Home Ranch Trust, and

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6/ [Cont'd] gains tax. By inconsistently contending that property settlements are not sales nor supported by consideration for estate tax purposes, the Treasury hopes to collect an estate tax. Such conduct is mere opportunism.

> such disproportionate share of the community property was not received by Joseph L. Haskins as consideration for the establishment of the Home Ranch Trust." (R. 101).

The evidence in the record is all to the contrary. The evidence in question consisted of two elements: First, the marital property settlement agreement and, second, testimony of Mildred's motivation and intent in requiring Joseph to set up the Home Ranch Trust and in agreeing to relinquish part of her interest in their community property.

First, the marital property settlement agreement states on its face that the covenants contained in it are consideration for each other.7/ Thus, the agreement itself establishes the fact that Joseph's promise to create the Home Ranch Trust was supported by consideration. The only real question was how much was paid to Joseph for this promise and how much was paid for other promises made by him in the same agreement. On this latter

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7/ "NOW, THEREFORE, in consideration of the premises and of the mutual promises, releases, waivers, and conveyances herein made, contained and provided for, or to be made, or to be hereafter made, IT IS MUTUALLY AGREED AS FOLLOWS, TO WIT:" (R.13).

question, appellant introduced lengthy and detailed evidence of the values of the properties, the amounts conveyed to each party, and the dollar amounts of the other obligations incurred by Joseph. By demonstrating that the other promises of Joseph were of relatively little value compared to his promise to create the Home Ranch Trust, appellant sought to show that the bulk of the community property relinquished by Mildred was consideration for the transfer to the Home Ranch Trust. The court below made no finding as to the value of the properties or the value of Joseph's other undertakings. All of these matters were immaterial once it found that the "disproportionate share of the community property was not received by Joseph L. Haskins as consideration for the Home Ranch Trust." (R. Finding ¶6). If it was not received for the Home Ranch Trust promise, what was it received for? Appellee itself admitted at the time of trial that the dollar amount of Joseph's other obligations could not exceed $25,247.43 (Def. Br. below, p. 30), yet Joseph received at least $66,823 in excess of his one-half of the community property (R.102, Findings ¶ 8). Does the court below assume that the difference was a gift from Mildred to Joseph? The property settlement

agreement nowhere refers to any gifts nor does it state that Joseph's promise to create the Home Ranch Trust was intended to be without consideration. To the contrary, it states that the promises are mutual consideration for each other (R. 13). The only way the excess (the community interest relinquished by Mildred) can be accounted for in a manner consistent with the declaration of consideration in the agreement is to treat it as consideration paid to Joseph for his promise to transfer property to the Home Ranch Trust. Because the trial court failed to make such findings, it must be reversed and the case remanded with instructions so to do.

Second, the court's finding of no consideration is contrary to the oral testimony in the record. That testimony, in the words of Mildred's attorney, Frank B. Campbell, was as follows:

> That Mildred was not interested in support or alimony (Tr. 30-31) although she could have gotten a substantial amount (Tr. 31);
>
> That Mildred wanted to prevent an unequal treatment of the children depending on whose side they took in the divorce (Tr. 31);

That Mildred said, "If I can tie up as much as I can of our community property so that the children will eventually get it, that is more important to me than getting what you say I am entitled to in income, or in getting my full share of half of the community property, or even more than half . . . ." (Tr. 41);

That her instructions to her attorney negotiating the property settlement agreement were to tie up as much as he could so that Joseph couldn't get married and spend the money on somebody else. (Tr. 42);

That Mildred was particularly interested in seeing that the Home Ranch and its contents be preserved for the children, as the things they had grown up with and enjoyed together (Tr. 42);

That a trust was in fact established rather than the outright gift permitted by the language of the property settlement agreement (Tr. 25); and

That the Home Ranch, its contents and an adjoining property were in

> fact transferred to the trust pursuant to Joseph's promise in the property settlement agreement (Tr. 35, 36).

Obviously from the foregoing Mildred thought she was relinquishing an interest in the community property in order to get Joseph to create the Home Ranch Trust. The evidence consists of all of the record below on the intent of the parties dehors the instrument itself. It was uncontradicted. Because the lower court's finding was contrary to it, the judgment must be reversed and the case remanded. In the remand, the court below should be instructed as follows: (1) To enter an ultimate finding that the transfer to the Home Ranch Trust was made for consideration; and (2) to enter an ultimate finding of the amount of that consideration, based upon preliminary findings on the value of the community property, the amount received by Joseph and Mildred, the value of Joseph's other promises, and the amount of any of Mildred's property allocable to Joseph's promise to create the Home Ranch Trust.

III. EVIDENCE OF A DECEASED PERSON'S DECLARATIONS OF PAST INTENT ADMISSIBLE UNDER THE

LAW OF CALIFORNIA WAS IMPROPERLY EXCLUDED BY THE TRIAL COURT.

Appellant offered the testimony of Joseph L. Haskins, Jr., the son of Joseph, the decedent, and Mildred (Tr. 87-88) for the purpose of showing that Mildred had bargained with Joseph at the time of the property settlement agreement to ensure that the Home Ranch would be preserved for her children (Tr. 101-102). The witness had had a conversation with Mildred, now also deceased, in 1954 or 1955, in which she stated to him the facts regarding the establishment of the Home Ranch Trust in the property settlement. Only the witness and Mildred were present. (Tr. 101). At this point the trial judge ruled,

> "If this was a conversation in 1954 or 1955, I am not interested, and I would sustain an objection which counsel is standing up ready to make. So I think you better get on to a different conversation." (Tr. 101).

Counsel for appellant thereupon made the following offer of proof:

> "In this conversation in which Mr. Haskins was asked to serve as executor of his mother's estate, which was implemented by the fact that he is the sole executor of his mother's estate, his mother disclosed to him at that time that provision had been made at the time of the property settlement for him and for his sisters by insuring that the Home Ranch and one-third of the other ranch would come to them; that this was something she had extracted from his father at the time of the divorce, and this was the testimony I hoped to elicit. It is hearsay, but I believe it is a proper exception to the hearsay rule, because of the circumstances of the conversation, because of the fact that Mrs. Haskins is dead, and because of the fact that the conversation took place before the present controversy with the Federal Government arose." (Tr. 101-102; R. 96, Stipulation for Correction)

At this point the trial judge turned to counsel for appellee and stated, "You have heard the offer of proof." (Tr. 102). Counsel for appellee then made the following objection:

> "I would like to renew my objection, your Honor. I still maintain it is hearsay and not admissible under any exception thereto. The facts of record as to what the parties did and accepted was gone over this morning. The facts are of record as to what they did with the property. Her thoughts, her wishes and her interpretations, I believe, are not competent evidence stemming from this witness or any witness who had a conversation with her to that effect." (Tr. 102).

The trial court then ruled, "Objection sustained."

In so doing, the court below committed reversible error. First of all, the testimony of the witness was competent: under California law it was not excludible hearsay. The California rule of evidence governing such declarations of past intent is based upon the theory that,

> "The stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distance up and down the current." Chaffee, Progress of the Law - Evidence 1919-1922, 35 Harv. L. Rev. 428, 444,

> cited with approval by Justice Traynor in People v. One 1948 Chevrolet Convertible Coupe, 45 Cal.2d 613, 290 P.2d 538, 543 (1955) [holding it reversible error to exclude evidence of a statement indicating prior knowledge of a fact, where such knowledge was a material element in the case].

The leading case establishing this doctrine is Whitlow v. Durst, 20 Cal.2d 523, 127 P.2d 530 (1942) [holding admissible declarations made after an alleged reconciliation that the decedent would never be reconciled as evidence of his previous intent not to become reconciled]. See, also, Kelly v. Bank of America Nat. Trust & Savings Assn., 112 Cal.App.2d 388, 246 P.2d 92 (1952), [declarations by a deceased grantor made some four years after delivery of a deed held admissible to show the intent with which deed was delivered] and Watenpaugh v. State Teachers' Retirement System, 51 Cal.2d 675, 336 P.2d 165 (1959) [holding admissible statements by a deceased declarant offered to show the intent with which he filled in the designation of beneficiary form from the Fund]. Rule 43(a), Federal Rules of Civil Procedure, requires the admission of evidence where

it is admissible under the rules used in the State where the court sits. United States v. Smith, 117 F.2d 911 (9th Cir. 1941), [application of State statute permitting refreshment of recollection]; Hartford Accident & Indemnity Co. v. Oliver, 123 F.2d 709 (5th Cir. 1941), [application of State's decisional law on res gestae to admit declarations of a decedent as to the cause of an illness leading eventually to his death]; 5 MOORE'S FEDERAL PRACTICE (2d Ed. 1951) p. 1319 at n. 6, 7. The case before this Court was tried before the United States District Court for the Northern District of California, Southern Division, which should have applied the California rule to admit this evidence.

The exclusion of the offered evidence of Mildred's intent was reversible error if this Court finds that there is insufficient evidence in the record as it stands to compel a finding that Mildred intended to use her leverage over the community property to get Joseph to tie up as much of the property as possible, in favor of the children. In such a case, the erroneous exclusion would change the outcome of the case to plaintiff's detriment. Thurber Corp. v. Fairchild Motor Co., 269 F.2d 841, 844 (5th Cir. 1959) [exclusion of evidence held reversible

error where "matters excluded were of such great significance and pertinence to the case at hand that we cannot say that the District Court's ruling did not 'affect the substantial rights of the parties', 28 U.S.C.A. §2111."]

That the intent of the parties is of paramount importance to this case is best illustrated by the approach of the trial court below. That court examined the record and concluded that the Home Ranch Trust was set up by Joseph without consideration because it was not bargained for; it was merely ". . . established in accomplishment of the joint and common purpose and intent of the father and mother to provide after their death for the financial well-being of their three children." (R. 105, l. 31-32; R. 106, l. 1-2). (Emphasis added). From what evidence did the trial court reach this conclusion? Certainly not from the four corners of the property settlement agreement itself; that agreement spoke only in terms of mutual promises in consideration of one another (R. 13). The court must, therefore, have looked to evidence or testimony outside of the document itself, although the opinion does not reveal which particular testimony was relied upon. Accordingly, we have the case of a trial

court looking to evidence outside of the written document in order to find out what the intent of the parties was. In so doing, however, the court excluded certain evidence offered by appellant on the intent of the parties. This evidence, if reasonably interpreted, supported appellant's contention that the promise of Joseph to create the Home Ranch Trust was bargained for; the evidence was thus directly contrary to the lower court's finding of no consideration because of the purpose and intent of the parties. The exclusion of the proffered testimony of Joseph L. Haskins, Jr. was therefore prejudicial error and the case should be reversed and remanded with instructions that the testimony be received.

CONCLUSION

The decision and judgment of the trial court should be reversed and the case remanded to the trial court with instructions as follows:

(1) The promise of the decedent to transfer property to the Home Ranch Trust was a promise made for consideration within the meaning of Sections 2036 and 2043 of the Internal Revenue Code;

(2) The amount of the consideration received by the decedent should be determined by findings to be entered as to the

value of the community property, the amounts received by each of the decedent and his wife, the value of the other promises made by the decedent in the property settlement agreement, and the amount of the wife's community property that was paid to the decedent for his promise to create the Home Ranch Trust.

(3) In the event the amount received by the decedent equalled or exceeded the value of the remainder interest transferred by the decedent to the Home Ranch Trust, the transfer by the decedent was a bona fide sale for a full and adequate consideration in money or money's worth within the meaning of Section 2036 of the Internal Revenue Code.

(4) In the event the amount received by the decedent was less than the value of the remainder interest transferred by the decedent to the Home Ranch Trust, the transfer by the decedent was a transfer for an inadequate consideration within the meaning of Section 2043 of the Internal Revenue Code.

(5) The testimony of Joseph L. Haskins, Jr. concerning a conversation he had with his mother, the decedent's wife, regarding her intent and purpose

in entering into the property settlement agreement should be received in evidence.

Dated, San Francisco, California
November 23, 1965.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

BARBARA ASHLEY PHILLIPS
Attorney for Appellant

APPENDIX

STATUTES INVOLVED

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INTERNAL REVENUE CODE OF 1954:

Sec. 2036. TRANSFERS WITH RETAINED LIFE ESTATE.

(a) General Rule. -- The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (Except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death --

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Sec. 2043. TRANSFERS FOR INSUFFICIENT CONSIDERATION.

(a) In General. If any one of the transfers, trusts, interests, rights, or powers enumerated and described in sections 2035 to 2038, inclusive, and section 2041 is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

REGULATIONS INVOLVED

TITLE 26, CODE OF FEDERAL REGULATIONS:

Sec. 20.2036-1 Transfers with retained life estate -- (a) In general. A decedent's gross estate includes under section 2036 the value of any interest in property transferred by the decedent after March 3, 1931, whether in trust or otherwise, except to the extent that the transfer was for an adequate and full

consideration in money or money's worth (see § 20.2043-1), if the decedent retained or reserved (1) for his life, or (2) for any period not ascertainable without reference to his death (if the transfer was made after June 6, 1932), or (3) for any period which does not in fact end before his death --

(i) The use, possession, right to the income, or other enjoyment of the transferred property, or

(ii) The right, either alone or in conjunction with any other person or persons, to designate the person or persons who shall possess or enjoy the transferred property of its income (except that, if the transfer was made before June 7, 1932, the right to designate must be retained by or reserved to the decedent alone).

Sec. 20.2043-1 Transfers for insufficient consideration -- (a) In general. The transfers, trusts, interests, rights or powers enumerated and described in sections 2035 through 2038 and section 2041 are not subject to the Federal estate tax if made, created, exercised, or relinquished in a transaction which constituted a bona fide sale for an adequate and full consideration in money or

money's worth. To constitute a bona fide sale for an adequate and full consideration in money or money's worth, the transfer must have been made in good faith, and the price must have been an adequate and full equivalent reducible to a money value. If the price was less than such a consideration, only the excess of the fair market value of the property (as of the applicable valuation date) over the price received by the decedent is included in ascertaining the value of his gross estate.